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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING CO. AND FEDERAL MINING AND SMELTING CO., *Appellants*,

v.

KENNEDY J. HANLEY, *Appellee*.

No. ~~998~~. 206.

Appeal from the United States Circuit Court for the District of Idaho.

APPELLANTS' BRIEF ON THE MERITS.

GEORGE TURNER,
F. T. POST,
Attorneys for Appellants.

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THE EMPIRE STATE-IDAHO MINING AND DEVELOPING CO. AND FEDERAL MINING AND SMELTING CO., *Appellants*,

v.

KENNEDY J. HANLEY, *Appellee*.

No. 595.

Appeal from the United States Circuit Court for the District of Idaho.

APPELLANTS' BRIEF ON THE MERITS.

STATEMENT OF THE CASE

The appellee, on the 9th day of March, 1898, brought his bill of complaint in the United States Circuit Court for the District of Idaho against Charles Sweeny, F. Lewis

Clark and the appellant, Empire State-Idaho Mining and Developing Company, alleging title in himself to two separate and district interests in the Skookum lode mining claim, a mining property in Shoshone County, Idaho, the first and larger interest being a one-third interest, the other a one-eighth interest. He alleged, with reference to the one-third interest, that defendants Sweeny and Clark had acquired a record title against him and the possession of the property by and through certain proceedings in the Probate Court of Shoshone County, Idaho, to which he was not a party, and of which he was not cognizant, and which were, therefore, void and of no effect. The allegations with reference to the one-eighth interest were that defendants Sweeny and Clark procured from him a conveyance to themselves of said interest by fraud, covin and deceit, in that they had violated the terms of an escrow agreement made by him for the sale of said interest, and abstracted the deed for said eighth interest from the escrow depository without complying with the terms of the agreement, and, further, that the said escrow agreement was entered into by him as the result of fraudulent misrepresentations and deceit practiced on him by said Clark and Sweeny.

Record, pp. 23 to 34, both inclusive.

The case was brought to issue and tried, resulting in a judgment in the lower court in favor of the defendants. On

appeal to the Circuit Court of Appeals the judgment of the lower court was reversed as to the one-eighth interest, but affirmed as to the one-third interest, and the case remanded to the lower court with instructions to proceed in conformity with the opinion. See 109 Federal Reporter, 712. Thereupon certain proceedings in the action were had in the Circuit Court, resulting in a judgment in the case that the defendants "have and each of them has no interest or estate whatever in or to an undivided one-eighth interest in and to the said Skookum mine and mining claim *and the ores therein contained;* that the complainant Kennedy J. Hanley since April 30, 1898, has been, and now is, the owner of an undivided one-eighth interest in and to said Skookum mine and mining claim and the ores therein contained, and said interest is hereby quieted in him."

Record, p. 49.

The said judgment also awarded to Hanley as a money recovery the sum of $260,672.43, which sum was subsequently paid, as alleged in the answer in the present case.

The present suit is for an accounting for ores mined since the date of the former judgment, and is based on allegations in the bill asserting ownership of the complainant to an eighth interest in the mine and the ores therein contained, and on the decree in the former suit quieting title of com-

plaint to said one-eighth interest in the said mine and said ore bodies.

The answer denies the ownership of complainant in the ore bodies from which the defendant mined the ores, alleges that said ore bodies belong to another mine, the San Carlos, the property of the defendants, by reason of the fact that they are part of a vein which has its apex in the said San Carlos mine, and which does not apex in the Skookum claim; and, with reference to the decree in the former suit, the answer alleges that the court was without jurisdiction to render a decree quieting the title of complainant to the ore bodies in the mine because the bill of complaint in that suit made no case for the quieting of title to said ore bodies. The answer sets forth the bill, answer and replication in the former suit, and the facts in that suit leading up to the judgment in support of the contention that the court was without jurisdiction in that suit to render a decree quieting title to the ore bodies in the mine.

The sole question in the case is whether, on the facts set up and pleaded in the answer, there was jurisdiction in the United States Circuit Court in the former suit to render the judgment quieting in the complainant Hanley title to one-eighth of *all* the ore bodies found within the boundaries of the Skookum mining claim. The lower court thought the answer failed to show want of jurisdiction and sustained com-

plainant's exceptions. The propriety of determining that question on an exception to the answer seems to have been settled in the affirmative by the opinion of this Court in In re *Sanford Fork & Tool Co.*, 160 U. S., 147. But however that may be, the defendants are the injured parties if that method of procedure be erroneous, and they make no question here and now against it. Complainant might have brought the case on for hearing on the bill and answer, and thereby tested the sufficiency of the answer, and the method adopted was equivalent to that course, and it has been so held in a number of cases.

In order that this Court may clearly understand the point in controversy, a further statement of facts occurring in the former suit will be valuable. On the first trial of the case in the Circuit Court the proofs both of complainant and defendant were devoted wholly to the principal equities of the bill, viz., the allegations concerning the proceedings in the Probate Court with reference to the one-third interest, and the allegations of fraud and deceit with reference to the one-eighth interest. Nothing was done toward fixing the money recovery to which complainant would be entitled in case he prevailed or toward fixing the amount or value of ore extracted by the defendants or its status as belonging to the Skookum claim or to some other claim. After the Circuit Court of Appeals had reversed the judgment of the Circuit

Court rendered in that trial, a reference of the case to a Master was made by the Circuit Court to take an accounting. At said accounting the defendants offered to prove that certain of the ores extracted by them from within the boundaries of the Skookum claim belonged to a vein which apexed in the San Carlos mining claim, another claim which belonged to defendants; that said vein did not apex in the Skookum claim and did not belong to it, and that for the reason aforesaid the complainant had no interest in the said ores, and was entitled to no recovery therefor. At this stage of the case, upon a showing made by the defendants, the character of which is now immaterial, proceedings before the Master were suspended by order of the Circuit Court; whereupon the complainant, Hanley, filed his petition in the said Circuit Court of Appeals for a writ of mandamus directed to Hon. James H. Beatty, Judge of the United States District Court of Idaho, sitting as Circuit Judge, requiring said Judge and said Court to proceed with the said accounting, and such proceedings were had on said petition that thereafter the said Circuit Court of Appeals handed down an opinion in which it was held and decided that complainant was entitled to have the mandate of the Circuit Court of Appeals enforced by an immediate accounting, and in which it was held and decided, *for the first time,* that the bill of complaint was one to quiet the title of Hanley in the Skookum Mining claim

and to *all* the ore bodies therein and within the vertical lines thereof, and that the defendants, having failed to set up in their answer that the ore bodies worked by them within the vertical lines of the Skookum claim belonged to a vein which had its apex in another and adjoining claim of defendants, such failure estopped defendants to show that fact on the accounting.

The opinion of the Circuit Court of Appeals will be found published in *Hanley v. Beatty* (District Judge) 117 Federal Reporter at page 59. Subsequent proceedings in the Circuit Court were governed in every respect by the opinion of the Circuit Court of Appeals in the mandamus case, and the right of defendants to show that the ores mined by them did not in fact belong to Hanley, but to them, the defendants, was cut off and denied to them, *Hanley v. Sweeny*, 126 Fed., 100. If the case made in original bill as to the one-eighth interest was one to quiet the title of Hanley to the Skookum claim and *all* the ore bodies contained within the vertical limits thereof, then defendants in this case are estopped to further litigate that question; but, if not, then the right remains to them to litigate the question of the ownership of the said ore bodies here, as they claimed the right to litigate the same question in the former suit.

ARGUMENT.

First. The bill in the original suit, so far at least as it had reference to the one-eighth interest, was not one to quiet title.

(a) We submit that the most careful and hypercritical pleader would fail to percieve in the allegations of the bill as to the one-eighth interest, anything more than an invitation to come into court and litigate with complainant the question of fraud in the procurement of the deed to said eighth interest set up in the bill. The bill does not proceed on the theory of a bill of peace, which is that the complainant is entitled to repose from litigation, or on the theory of a bill *quia timet*, which is the prevention of anticipated wrongs or mischief, but it proceeds on the theory of the right of complainant as actor and moving party, to have redress for wrong and mischief already committed. The allegation is that complainant was induced to make the deed to the eighth interest by fraudulent misrepresentations and concealment and that after he had made the deed it was fraudulently abstracted from the escrow envelope, and the prayer is that the deed be declared void and of no effect, and for an accounting of complainant's share of the proceeds of the ore mined since the making of the deed. The allegations concerning ore bodies in the mine and their value, and the fact that defendants were working out the ore, which constitute the balance of the bill, with one exception

to be hereafter noticed, were all in aid of the right to an accounting, or to the temporary relief of an injunction and receiver sought in the prayer of the bill. There is one allegation which would be proper in a bill of peace and which alone gives color to the claim that the bill was technically one to quiet title. That allegation is the concluding one in the bill and is as follows: "The said defendants claim an estate or "interest in *said* undivided one-eighth interest in said 'Skoo-"kum' claim adverse to your orator, which claim of said de-"fendants is without any right whatever, and that said de-"fendants have not any estate, right, title or interest what-"ever in said land and premises, or any part thereof, the "property of your orator, as aforesaid." The bill had already set up that defendants were in possession of the property claiming title to his eighth interest under the deed procured from him by fraud, and what other estate or interest could defendants assume he meant by his concluding allegations than that particular estate or interest. It is true that this last allegation was supplemented by one of the prayers of the bill, "that defendants be required to set forth the "nature of their claims to said premises and that all adverse "claims of said defendants may be determined by the decree "of this Court," etc., but that prayer defendants were entitled to consider as outside the scope of the bill or as simply requiring them to answer the allegations of fraud set up in the bill.

Scandalous and impertinent averments in a bill, unless they amount to setting up a second distinct and perfect cause of action, do not constitute multifariousness. Hence it is said to be proper in such case to answer to the matter within the jurisdiction of the Court and to demur to the other for want of equity, or to answer to both and make exceptions to the want of equity in the latter, at the hearing:

Story's Equity Pleading, 10 Ed., Sec. 283, and authorities cited in note.

Defendants felt justified in following the latter course in this case, but were deprived of the opportunity to object after hearing, to the impertinent allegations, by the holding in the mandamus case that those allegations gave the bill the aspect of one to quiet title.

Pleadings in equity as at law are construed most strongly against the pleader, and where the bill contains general and specific allegations as to the same matter, the general allegations will be referred to the particular and specific ones:

Story's Equity Pleadings, 10 Ed., Sec. 28, note 5.

What then would any good pleader understand the bill to mean? If it were alleged simply that complainant owned an undivided one-eighth interest in the Skookum claim and all ore bodies within the vertical lines thereof, and that defendants claim to have some right, title or interest therein,

and that such claim of the defendants therein was without right, there would be some ground for the contention that a bill of peace was intended by the pleader. But it is alleged that the complainant being the owner of one-eighth interest in said mining claim, the defendants, by certain means set out in the bill at great length, had defrauded him out of said interest, and were in possession of said claim under said fraudulent deed, despoiling it of its ore, and undoubtedly we were entitled to construe the general concluding averment that "the "said defendants claim an estate or interest in said undivided "one-eighth interest," etc., as referring wholly and entirely to the circumstances of their claim under the alleged fraudulent deed.

(*b*) But if the bill can be construed as one to quiet title it cannot be construed as one to quiet title to more than the mining claim and to the ore bodies which properly belonged to the mining claim. The only allegations concerning ore bodies found in the bill are:

1. An allegation that the works carried on by defendants in another mine had penetrated into the Skookum ground and "had disclosed an immense body of ore of great value," and that Clark and Sweeny had willfully falsified and misstated the facts concerning the mine in order to defraud complainant of his interest.

2. An allegation that "the ores contained in said Skoo-

"kum mine are of such value that there has been taken out of "said ore body thus disclosed in said ground up to the present "time, ore of the value of not less than $150,000 net, over "and above the cost of mining, treating, extracting and mar- "keting the same, of which your orator is entitled to the "share represented by his interest in said Skookum mine here- "tofore set forth."

3. An allegation that the defendant, the Empire State-Idaho Mining & Developing Company, "has been engaged "in working and mining the ores contained as aforesaid in "said Skookum mining claim, under the supervision and di- "rection of said Clark and Sweeny," etc.

4. An allegation "that the defendants give out and "assert that they have many million dollars worth of ore in "sight therein (in the Skookum mine) and that they intend to "take the same to their own use."

5. An allegation "that said described property is of no "value except for the ore it contains and that the defendants "are rapidly exhausting the same," etc.

6. An allegation "that said defendant company, acting in "conjunction and under the direction of said Sweeny and "Clark are working a force of no less than one hundred "miners and workmen in taking the ores out of said ground, "and despoiling it at a rate that will be destructive of your

"orator's interest therein unless they are prevented by this "Court," etc.

7. An allegation "that the ore body of said 'Skookum' "mine now being worked and despoiled by the said corpora- "tion defendant, is approached by a tunnel passing through "the 'Last Chance' mining claim and penetrating the 'Skoo- "kum' claim, called the 'Sweeny Tunnel,' and that said "tunnel is under the control of defendants," etc.

The first of these seven allegations constitutes a part of the statement of the alleged fraud perpetrated on complainant. The other six allegations were clearly inserted for the purpose of showing the right to an accounting, the large proportions which the same would assume, and the right of complainant to the temporary injunction and receiver prayed for in the bill. It is incredible that, on such allegations, complainant meant to make a case for quieting title to the ore bodies referred to by him, against the right of some other claim to these ore bodies by reason of the vein or lode to which the ore bodies belonged, apexing in the other claim. If he did not intend to make such a case, then it was not the duty of the defendants to respond to such a case in its answer. In this connection we call attention to the concluding allegation in the bill, which alone gives it the aspect of a bill of peace. "The said defendants claim an estate or interest in *said* "undivided "one-eighth interst in said 'Skookum' claim adverse to your

"orator," etc. Nothing is said about the ore bodies. In the prayer to have title quieted there is the same failure to mention ore bodies. The interest to be quieted is described there as "*said* undivided interest of your orator in said 'Skookum' claim."

In this view of the case there was no obligation on the part of the defendants to set up title to the ore bodies separate and apart from their title to the claim.

(*c*) If on general allegations like those in this bill of complaint the right of adjoining owners may be foreclosed and estopped, then the policy of the statutes of the United States on the subject of the ownership of ore bodies may be easily defeated. Can the owner of one of several undeveloped claims on a mountain side bring an action against owners of the adjoining claims to quiet title to the ore bodies lying beneath the surface of his claim, and by judgment in such action prevent the operation of the law that the adjoining owners are entitled to follow veins apexing within their claims into other adjoining claims? If he may do that, can he, by simply alleging in said action that his claim contains ore bodies of enormous extent and great value, throw on the owners of the adjoining claims the burden of alleging and proving, at the risk of being forever estopped, something that they do not know, namely, that the ore bodies referred to in the bill belong to a vein which apexes in their ground?

Suppose in such a case that at the time of filing the answer the defendant was working in an ore body that had its apex within the claim in question, and had no knowledge of any other ore bodies, and that after final judgment in that case there should be discovered other ore bodies lying within the vertical lines of his claim, which had their apex in another mining claim belonging exclusively to the defendant, and which claim was so located as to its side lines and end lines that the owner thereof would have the right under the statute to follow the vein outside of the side lines of that claim to the ore bodies in question, would the defendant in that case be estopped to assert title to these newly discovered ore bodies by reason of his failure to set up those facts in his answer? Can the provision of Section 2322 of the U. S. Revised Statutes be thus nulified?

These considerations show the utter fallacy of the view taken by the Circuit Court of Appeals, that failure of defendants in this action to set up affirmatively the apex question estopped them to take advantage of the question on the accounting.

(*d*) That the bill cannot be considered as one to quiet title is settled, we think, by the decision of this Court in the case of *Boston & M. Consolidated C. & S. M. Co. v. Montana Ore Purchasing Co.*, 188 U. S., 632. In that case as

in this, the attempt was made to bolster the case of the complainant by claiming that the bill was one to quiet title, but this Court disposed of that contention by an analysis of the bill, showing that another and different cause of action was set up in the bill, and also by the statement that the bill was fatally defective as one to quiet title, because it did not show that the complainant's title had been established at law and it did show that complainant was out of possession and that defendant was in possession of the property in dispute. The decision might have been made in this case because it covers all phases of the question as presented in these subheads, "a," "b," "c" and "d."

Second. The bill not being one to quiet title, either to the mine or the ore bodies therein contained, and certainly not to the latter as against some other mine claiming the apex, on well recognized and well established principles there was no jurisdiction in the court to make a decree quieting the title to said ore bodies.

Reynolds v. Stockton, 140 U. S., 254.
Munday v. Vail, 34 N. J. Law, 418.
Unfried v. Hebeau, 63 Ind. 67.
Smith v. Ontario, 18 Blatchford, 454.
Packet Co. v. Sickles, 24 Howard, 333.
Ex parte Lange, 18 Wall, 163.
Gifford v. Hart, 1 Sch, & Lef., 386.
Gore v. Stackpole, 1 Dow, 18.

Colclough v. Sterum, 3 Bligh, 181.
Seamster v. Blackstock, 83 Va., 232.
Wood v. Stanberry, 21 Ohio St., 142.
Fithian v. Monks, 43 Mo., 502.
Boswell. v. Dickerson, 4 McLean, 262.
Co. Litt. 352 b.
Freeman on Judgments, Vol. 1, Sec. 242.

Jurisdiction of any court exercising authority over a subject may be inquired into in every court where the proceedings of the former are relied on and brought before the latter by one claiming the benefit of such proceedings.

Elliott v. Piersol, 1 Peters, 341.
Lessee of Hickey v. Stewart, 3 Howard, 762.
Guaranty Trust, etc., Co. v. Green Cover, etc., R. R. Co., 139 U. S., 147.
Thompson v. Whitman, 18 Wall. 467.

Third. But another principle has been established by this Court which will serve us as well as to have the decree in the former case declared void and ineffective. It has been held that a decree in equity must be considered in connection with the pleadings and if broader than required will be limited by construction so that its effect will be such only as is needed for the purposes of the case made and issues decided.

Barnes v. Chicago, etc., Ry. Co., 122 U. S., 14.

The decree in this case undertakes to quiet title not only to the interest in the mining claim asserted by the complainant, but to "the ores therein contained."

Manifestly, there was no issue in the case requiring or permitting the quieting of title to the ores in the mining claim as aginst some other mine claiming the apex of the vein, of which some of the ores within the boundaries of the mine formed a part. That question was not in the mind of any body at the time the issues were joined in the case; therefore, if the case were one for quieting title at all, it was simply to the Skookum claim and the ores therein which belonged thereto. If the decree be thus limited by construction, and it does no violence to its language to so limit it, then there is no estoppel created by the decree against our now asserting in the present case title to a part of the ores lying within the boundaries of the Skookum claim, by virtue of our ownership of another patented mining claim in which the ore vein apexes.

Respectfully submitted,

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